



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL APPEAL NO. 146 OF 2017**

**NICHOLAS YATICH KABUTIE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no 263 of 2016 delivered on the 16<sup>th</sup> day of September, 2016 by Hon. E.M. Ayuka, RM]**

**JUDGMENT**

1. The appellant was on 16/9/16 convicted for attempted rape contrary to section 4 of the Sexual Offences Act and sentenced to imprisonment for 5 years, the trial court observing that “*the Sexual Offences Act sets the minimum mandatory sentence in this kind of offence.*”

2. By his written submissions filed in court herein, the appellant does not challenge the conviction as he urges that “*being a first offender I have learnt my mistakes and the matter herein emanated by the use of drugs, alcohol and working with bad company hence it has led to my conviction*” and the prays that the “*Court reevaluates and reconsiders the period I served in remand which was not considered during my conviction and give me a non-custodial sentence*”.

3. DPP opposed the appeal and urged that the evidence was overwhelming against the appellant who was positively identified as the assailant and that the appellant had fled the scene leaving behind his slippers and condoms, which clearly shows that he had intended to rape the complainant.

4. Although the conviction was not challenged, this court has consistently with the duty of a first appellate court (*Okeno v. R* (1972) EA 32) considered the evidence before the trial court and find the evidence of the complainant PW1 and PW2 on identification of the appellant to corroborate each other and further both are corroborated by that of PW3 who on arrest of the appellant found that the appellant had a fresh bite wound on his right thumb. As testified by the complainant, she had in the course of the struggle with the appellant bitten his hand. The evidence of condoms left behind by the appellant put the attempt to rape beyond doubt.

5. Section 4 of the Sexual Offences Act provides for minimum sentence for attempted rape as follows:

*“4. Any person who attempt to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life”.*

6. Although he was granted bail upon plea, the appellant who was arrested on 16/3/16 had during his trial remained in custody until his conviction and sentence on 16/9/16, a period of 6 months.

7. There is no indication in the Record of proceedings of the trial Court that the trial Court considered, as it was required by section 333(2) proviso of the Criminal Procedure Code, the period of pre-trial detention of 6 months. Section 333(2) of the Criminal Procedure Code provides as follows:

*“(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this case.*

*Provided that where the person sentenced under sub-section (1) has, prior to such sentence, been held in custody, **the sentence shall take into account the period spent in custody.***

8. The Kenya Judiciary's Sentencing Policy Guidelines at paragraph 7.17 provides that “*where a law provides mandatory minimum*

*sentences, then the court is bound by these provisions and must not impose a sentence lower than what is prescribed.*

**Orders**

9. Accordingly, upon finding that the appellant was properly convicted for the offence of attempted rape contrary to section 4 of Sexual Offences Act, the court pursuant to section 354 (3) of the Criminal Procedure Code dismisses the appeal against the mandatory minimum sentence of imprisonment for 5 years.

10. Pursuant to section 333 (2) proviso of the Criminal Procedure Code, the court, however, directs that the period of 5 years imprisonment shall be reckoned from the 16/3/2016, the date when the appellant's pre-trial detention commenced.

*Order accordingly.*

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent